

**IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION**

Case number: **NCT/167323/2020/75(1)(b)**

In the matter between:

ZOLA SOYAYA

APPLICANT

and

MYKATRADE 87 CC t/a INSPECTA CAR

RESPONDENT

Coram

Dr MC Peenze - Presiding Tribunal Member

Mr T Bailey - Tribunal Member

Ms H Alwar - Tribunal Member

Date of Hearing - 13 April 2021

Date of Judgment - 17 April 2021

JUDGMENT AND REASONS

THE PARTIES

1. The Applicant is Zola Soyaya ("the Applicant"), an adult male. At the hearing, Mr Soyaya was represented by Mr Janusz F Luterek from Hahn & Hahn Attorneys.
2. The Respondent is Mykatrade 87 CC t/a Inspecta CarCaledon Toyota (registration number: 2001/085394/23), a closed corporation, duly incorporated and registered under the laws of the Republic of South Africa, with its principal place of business and registered address at 3 Catalina Avenue, Rhodesfield, Kempton Park, Gauteng ("the Respondent").

3. The Respondent did not oppose this matter, nor did it appear at the hearing. The Tribunal was satisfied that the service requirements in terms of Rule 30 were met. The Applicant served the application on the Respondent via registered mail and provided proof of such delivery to the Tribunal. On the hearing date, the Tribunal was satisfied that the notice of set down was adequately served on the Respondent, and the matter proceeded on a default basis.
4. The Tribunal conducted the hearing via a ZOOM technology link due to the physical distancing protocols imposed in response to the Covid-19 pandemic.

THE APPLICATION

5. This is an application by the Applicant for relief in terms of the Consumer Protection Act, 68 of 2008 ("the CPA"). The application arises from the Applicant having purchased a second-hand vehicle from the Respondent, based on photographs of the vehicle presented to the Applicant. At delivery, the vehicle was different from the photographs, and the Applicant discovered various defects.
6. The Applicant seeks a full refund of the vehicle's purchase price or any other relief the Tribunal deems fit.

BACKGROUND

7. On 21 May 2019, the Applicant's brother informed the Applicant of the second-hand 2016 Toyota Quantum for sale by the Respondent in Gauteng. Hereafter, the Applicant, who stays in the Eastern Cape Province, requested the sales executive of the Respondent, Mr Ndumiso Malinga, to send the Applicant pictures of the vehicle. The Respondent sent coloured pictures of the vehicle on 22 May 2019, which pictures were put into evidence before the Tribunal. These pictures displayed the vehicle in good condition, although the number plate was not photographed.
8. As the sales executive informed the Applicant that the vehicle had scratches on the front bumper, fender and door, the Applicant negotiated a discount and agreed that the Respondent would repair the dents and scratches at a price of R6,900.00 before delivery. Subsequently, the Applicant purchased the 2016 Toyota Quantum with registration number GG 999 L from the Respondent on 22 May 2019 and paid a deposit of R50,000.00.
9. The vehicle was sent for repairs, and on 28 May 2019, the pictures of the repairs made were sent to the Applicant. As the Applicant was satisfied that the repairs on the vehicle were completed, he paid the balance of R351,400.00 on 30 May 2019.

10. In total, the Applicant paid an amount of R401,400.00 (which included the purchase price of R390,000.00¹ plus R4,500.00 delivery cost and R6,900.00 repair costs²).
11. On 2 June 2019, the Respondent sent the vehicle to the Applicant in the Eastern Cape. Upon arrival, the Applicant inspected the vehicle and found the following defects on the vehicle: the tyres were worn out; there were numerous dents all over the vehicle's body and smoke was emitting from the exhaust.
12. The Applicant refused or rejected the delivery of the vehicle and requested that the Respondent refund him the money that he had already paid for the vehicle.
13. The Respondent refused to refund the Applicant but accepted the return of the vehicle.
14. On 10 June 2019, the Applicant reported the matter to the Motor Industry Ombudsman of South Africa ("MIOSA"). MIOSA could not address the dispute of facts relating to the state of the vehicle. The Applicant subsequently referred the matter to the National Consumer Commission ("the NCC").
15. The NCC issued a notice of non-referral of the Applicant's complaint on 26 May 2020, outlining that the NCC cannot provide the redress sought.
16. The Applicant proceeded to apply for leave to refer his complaint directly to the Tribunal.
17. The Tribunal considered the application for leave to refer on an unopposed basis on 29 January 2021 and subsequently granted the application on 2 February 2021.

ISSUES TO BE DECIDED

18. The Tribunal is required to consider and decide on the following issues:
 - 18.1 Whether the CPA applies to this specific matter;
 - 18.2 Whether the Applicant has proved a contravention under the CPA; and
 - 18.3 Whether the Applicant is entitled in law to the relief sought, namely the refund of the selling price.

¹ See page 30 of the Tribunal Bundle

² See page 33 of the Tribunal Bundle

THE HEARING

19. The matter was heard on an unopposed basis. This judgment is based on the documents before the Tribunal and evidence provided by the Applicant during the hearing of this matter before the Tribunal.
20. The Applicant's representative explained the case and detailed the reasons for the allegations against the Respondent and the alleged contraventions of the CPA. In particular, he submitted that the matter was of grave importance to the Applicant due to the following:
 - 20.1. The Applicant is not in possession of the vehicle;
 - 20.2. The Applicant bought the vehicle with the view of generating an income to support his family;
and
 - 20.3. The absence of the vehicle hinders the Applicant from executing his responsibilities as the man of the house and causes him financial stress.
21. According to the Applicant, there is common cause in the agreement between the parties to deliver a reasonable quality motor vehicle to the Applicant as a consumer. As the vehicle that arrived in the Eastern Cape was defective and not true to the pictures as sent by the Respondent, the Applicant submitted that the Respondent misled him.
22. The Applicant further submitted that he has the right to fair and responsible marketing of goods in a manner that is not misleading regarding the condition in which the goods are to be supplied. The vehicle's body was so damaged at its arrival in the Eastern Cape that it created the impression that the vehicle was driven recklessly during a storm. According to the Applicant, the Representative failed to advise the Applicant of the vehicle's true condition, namely that the whole body of the vehicle was damaged, and that the vehicle was unacceptably emitting smoke. The Applicant believed that the supplier directly or indirectly expressed or implied a false, misleading and deceptive representation of the vehicle by sending photos of the vehicle that depicted the vehicle's state as good, with proper tread on the tyres and without overall body dents.
23. The Applicant argued that he has the right to demand quality service from the supplier and recourse should he not receive such services. Accordingly, he submitted that the Respondent failed to deliver the vehicle free of defects and in such a condition that would be reasonably expected. Further, the Applicant submitted that he has the right to safe, good quality goods reasonably suitable for the specific purposes that he had indicated, namely to transport persons. Accordingly, the Applicant requested to be refunded the price paid by him for the vehicle.

24. The Applicant outlined that he would suffer prejudice should the application not succeed, while the Respondent will not suffer any harm or prejudice if the relief is granted. In the alternative, the Applicant submitted that any prejudice to be suffered by the Respondent, if there is any, cannot outweigh the prejudice which he is suffering. The Applicant confirmed that he is still paying monthly instalments, as he took out a loan to purchase the vehicle. However, he is not in possession of the vehicle, as he immediately returned the vehicle to the Respondent without driving it.
25. The Applicant relied on section 56 of the CPA, which states that a consumer may request within six months of delivery of the goods purchased to be refunded the amount paid for the goods if the goods fail to satisfy the requirements and standards contemplated in section 55 of the CPA. According to the Applicant, section 55 (5) of the CPA confirms that it is irrelevant whether the failure or defect was latent or patent or whether the consumer could detect it before taking delivery of the goods.

EVALUATION OF FACTUAL EVIDENCE

26. The Tribunal considered the written and oral evidence presented by the Applicant.
27. The Respondent failed to oppose the matter. Accordingly, the undisputed evidence before the Tribunal is that the vehicle presented with serious damage to the body and with suspicious smoke emitting from the engine at the time of its delivery to the Applicant. The damage to the body did not show in any of the photos as provided to the Applicant, and the Respondent did not alert the Applicant to it.
28. The Applicant has gone to great lengths in his attempts to resolve his complaint with the Respondent. He has persistently prosecuted his complaint and tried to resolve his complaints with the Respondent directly on numerous occasions. He lodged his complaint with the MIOSA and the NCC; and ultimately referred his complaint, after the NCC non-referred his complaint, to the Tribunal.
29. The Tribunal was convinced by the evidence and argument presented by the Applicant that:
- (i) The Respondent misled the Applicant about the existence of defects in the vehicle at the time of purchase, including the origins and dates of the defects; and
 - (ii) The Respondent made misrepresentations to the Applicant regarding the vehicle's state by sending pictures to the Applicant that did not properly reflect the vehicle's true state; alternatively, the Respondent provided the Applicant with pictures of a vehicle other than the vehicle delivered to the Applicant.

30. Accordingly, the Tribunal accepted the Applicant's version of events regarding the Respondent's misrepresentation about the quality of the vehicle and the existence of numerous defects identified by the Applicant when the vehicle got delivered by the Respondent after payment.
31. The Tribunal further acknowledged that the Applicant returned the vehicle within the first six months after purchase, without driving the vehicle. The Tribunal also observed that the Applicant did not drive the vehicle and that the Respondent accepted the return of the vehicle without refunding the Applicant.

LEGAL PRINCIPLES

The Law Regarding Defects

32. In Section 53 (1) (a) of the CPA, a "defect" is defined as follows:

- "(i) any material imperfection in the manufacture of the goods or components, or performance of the services, that renders the goods or results of the services less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or*
- (ii) any characteristic of the goods or components renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances."*

33. Section 55 (2) of the CPA states -

"Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that-

- (a) are reasonably suitable for the purposes for which they are generally intended;*
- (a) are of good quality, in good working order and free of any defects;*
- (a) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and*
- (a) comply with any applicable standards set under the Standards Act, 1993 (Act No. 29 of 1993), or any other public regulation."*

34. Section 56 of the CPA states -

"(1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and retailer each warrant that the goods

comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control of the producer or importer, a distributor or the retailer, as the case may be.

- (2) *Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55, and the supplier must, at the direction of the consumer, either-*
- (a) *Repair or replace the failed, unsafe or defective goods; or*
 - (a) *Refund to the consumer the price paid by the consumer, for the goods."*

The law regarding the return of goods

35. Section 20 of the CPA deals with the consumer's right to return goods. Section 20 (1) provides that the consumer's rights to return goods in section 20 are in addition to, and not in substitution of consumers' rights to return unsafe or defective goods, contemplated in section 56; or any other right in law between a supplier and consumer to return goods and receive a refund.³ Section 20 (2) provides that *"Subject to subsections (3) to (6), the consumer may return goods to the supplier, and receive a full refund of any consideration paid for those goods ..."*
36. Section 20 (5) and (6) deal with the refunds the supplier should make to a consumer and the amounts the supplier may charge consumers. The sections provide as follows:
- (i) *"(5) Upon return of any goods in terms of this section, the supplier must refund to the consumer the price paid for the goods, less any amount that may be charged in terms of Subsection (6). "*
 - (ii) *"(6) In determining the right of a supplier to impose a charge contemplated in Subsection (5), if any goods returned to the supplier in terms of this section are—*
 - (a) *in the original unopened packaging, the supplier may not charge the consumer any amount in respect of the goods;*
 - (b) *in their original condition and repackaged in their original packaging, the supplier may charge the consumer a reasonable amount for—*
 - (c) *use of the goods during the time they were in the consumer's possession unless they are goods that are ordinarily consumed or depleted by use, and no such consumption or depletion has occurred; or*

³ See section 20(1) of the CPA.

- (d) *any consumption or depletion of the goods, unless that consumption or depletion is limited to a reasonable amount necessary to determine whether the goods were acceptable to the consumer; or*
- (e) *in any other case, the supplier may charge the consumer a reasonable amount—*
 - i. *as contemplated in paragraph (b); and*
 - ii. *for necessary restoration costs to render the goods fit for re-stocking, unless, having regard to the nature of the goods, and how they were packaged, it was necessary for the consumer to destroy the packaging to determine whether the goods—*
 - (aa) *conformed to the description or sample provided, in the case of goods that had not been examined by the consumer before delivery, as contemplated in subsection (2)(b); or*
 - (bb) *were fit for the intended purpose, in a case contemplated in subsection (2)(d)."*

Definition of prohibited conduct

37. The CPA defines prohibited conduct to mean an act or omission that contravenes the CPA.

Section 29: General standards for the marketing of goods or services

38. Section 29 precludes a retailer from marketing goods in a manner that is likely to imply a false or misleading representation concerning those goods as contemplated in section 41.

Section 41: False misleading or deceptive representations

39. Section 41 (1) precludes a supplier or permitting another person on behalf of the supplier by words or conduct when marketing goods from expressing a false, misleading or deceptive representation concerning a material fact to a consumer.

DISCUSSION

40. To apply the provisions of section 55 of the CPA, it must be clear that the vehicle supplied by the Respondent was not of good quality, in good working order or free of defects. If the defects became apparent within six months, then section 56 of the CPA would apply, and the Applicant would be entitled (at the very least) to a refund of the vehicle's purchase price.

41. Before the Tribunal, the undisputed evidence is that the vehicle as delivered was not the same as the vehicle in the photos. The Tribunal therefore concluded that the vehicle delivered was either a different

vehicle or not in the same condition as the one bought. When delivered, the vehicle presented with various defects, including worn-out tyres, black smoke from the exhaust and body dents "as if the vehicle was driven when there was a storm".⁴ The Applicant outlined how the Respondent made deceptive representations concerning the vehicle purchased and submitted that the Respondent displayed prohibited conduct in terms of the CPA.

42. The evidence before the Tribunal is further that the vehicle showed defects immediately when delivered in the Eastern Cape. The Tribunal relied on the Applicant's affidavit and evidence presented at the hearing, which were not factually disputed. These support the deduction that the Applicant was indeed misled, and that the vehicle was delivered in an unacceptable state.

43. The Applicant outlined that he brought the defects and his dissatisfaction with the goods immediately to the Respondent's attention. The Applicant returned the vehicle. However, the Respondent refused to accept liability and refused to refund the Applicant.

44. **Section 117 of the CPA states as follows:**

"In any proceedings before the Tribunal, or before a consumer court in terms of this Act, the standard of proof is on a balance of probabilities."

45. Based on the merits of the matter as accepted by the Tribunal, the only inference that the Tribunal can draw is that the vehicle was not in proper working order and could not be used by the Applicant for procuring purposes.

46. Based on the evidence before the Tribunal, the Tribunal concludes that the vehicle was not in the state as expected and presented with defects within the first six months after purchase. Accordingly, the Applicant is entitled to exercise his rights under section 56 of the CPA. Therefore, in terms of the CPA, the Respondent can be held responsible for refunding the vehicle's cost.

47. There is no doubt to the Tribunal that the Applicant is a tenacious consumer who pursued this matter for three years through all the legal channels because he passionately believed that he was treated unfairly by the Respondent.

⁴ See page 59 of the Tribunal bundle

48. The Respondent delivered a vehicle different from the vehicle as marketed to the Applicant. It follows that the Respondent made a false representation concerning material facts to the Applicant in word and conduct when he marketed the vehicle.
49. Section 54 provides that a consumer is entitled to the performance of services in a manner that persons are generally entitled to expect and the delivery and use of goods that are free of defects and a quality that persons are generally entitled to expect.⁵ The Applicant alleged that, after the defects had been identified, he had been treated poorly. Therefore, the Respondent had acted in contravention of this section.
50. As outlined above, Section 55 (2) is not without qualification. Section 55 (6) qualifies consumers' rights in section 55 (2) as follows:
- "Subsection (2)(a) and (b) do not apply to a transaction if the consumer –*
- (a) Has been expressly informed that particular goods were offered in a specific condition;*
 - and*
 - (b) Has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition."*
51. Applying this section to the Applicant's matter, he had the right to receive a motor vehicle that was reasonably suitable for the purpose for which it was generally intended. The vehicle must be of good quality, in good working order and free of any defects. It must be usable and durable for a reasonable period in time, regarding the use to which vehicles of this nature would normally be put. The Applicant argued that the Applicant never informed him of any "specific conditions" such as worn tyres, body full of dents and engine smoking. The Applicant also did not expressly agree to accept the goods in that condition, especially since the vehicle was only 3 years old and a luxury vehicle.
52. The Tribunal considered the Applicant's right *"to receive goods that will be useable and durable for a reasonable period, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply..."*.
53. According to the Applicant, it is important to have a reliable vehicle to execute daily functions; and he was under the impression that the vehicle was safe and sound when the vehicle was bought. The vehicle turned out to be unusable, untrustworthy, and unsafe.

⁵ Section 54(1)(c) of the CPA.

54. In the Tribunal's view, the vehicle did not satisfy the requirements of section 55 (2) because the vehicle was not suitable for its intended purpose; was not of good quality, in good working order and free of defects; and 'plainly' not usable and durable for a reasonable time. Therefore, the Applicant was entitled in terms of section 56 (2) to return the vehicle to the Respondent within six months of taking delivery of the vehicle **without incurring a penalty**. In that event, the Respondent was obliged to replace the vehicle or refund the Applicant the purchase price.
55. The Tribunal is satisfied that the Applicant returned the vehicle to the Respondent in terms of his rights under section 56 (2) of the CPA. This attempt was within six months of the Applicant having taken delivery of the vehicle.
56. Section 56 of the CPA provides consumers with an implied warranty of quality. In terms of this implied warranty, a retailer warrants that the goods being supplied comply with the requirements and standards contemplated in section 55, except to the extent that these goods have been altered contrary to instructions or after leaving the control of the retailer. As outlined above, within six months after delivering the goods to a consumer, the consumer may return the goods to the supplier without penalty and at the supplier's risk and expense if the goods fail to satisfy the requirement and standards contemplated in section 55. At the consumer's direction, the supplier must either repair or replace the defective goods or refund the consumer the price paid by the consumer for the goods.
57. The Applicant alleged that he purchased a defective vehicle, and that the Applicant has lost faith in the Respondent. This matter, therefore, clearly falls within the ambit of the CPA. It should be noted that, in line with section 56 (4) of the CPA, the implied warranty imposed by 56 (1) and the right to return goods set out in 56 (2) are each in addition to any other implied or expressed warranty or condition stipulated by the producer or retailer.
58. Therefore, the Applicant's tender to return the vehicle and claim a refund does not lie on a contractual warranty or insurance guarantee but a statutory remedy available to the Applicant under the CPA. A limitation to the Applicant's rights must, therefore, lie in the CPA. Thus, the Applicant correctly relies on sections 56 (2) and (3), which do not limit the Applicant's rights to return the vehicle and reclaim the purchase price. If the legislature had intended to limit a consumer's rights under sections 56 (2) and (3), then it would have inserted a similar provision to that contained in section 20 (6).⁶ This latter section requires a consumer to account for the use, depletion, or deterioration of the returned goods.

⁶ Section 20 deals with a consumer's right to return goods and does not substitute the right to return unsafe or defective goods in section 56.

59. In this matter, the consumer paid for a vehicle, but was deprived of using it.

FINDING

60. The Tribunal finds that the Respondent has contravened sections 41 (1), 55 (2) and 56 (2) and (3) of the CPA, which constitute prohibited conduct.
61. The Applicant's version of the facts is believed to be the true version on a balance of probabilities; as supported by the evidence as led during the hearing, namely:
- (i) That the Applicant reported his dissatisfaction with the vehicle and subsequent flaws as identified, within the first six months after purchasing the vehicle;
 - (ii) That the Respondent had misled him to believe that it would deliver a vehicle free of defects; and
 - (iii) That the Respondent accepted the vehicle's return but failed to refund the purchase price.
62. The Respondent acted in contravention of the CPA by creating the impression that the Applicant does not have an inherent warranty. The Respondent was expected to honour the six-month inherent legislative warranty and replace the vehicle or return the purchase price if it could not be delivered as expressly agreed and marketed to the Applicant.
63. Applied to the actual provision of goods and services as delivered by the Respondent, the Tribunal finds that the Applicant did not receive good quality goods or services as required in terms of Section 54 of the CPA.
64. The Tribunal finds that the Applicant did not receive the vehicle suitable for the purpose for which it was generally intended, namely the safe transport of people and goods. It is found that the vehicle was not of good quality, in good working order and free of any defects.
65. The Applicant was entitled to demand that the vehicle be replaced or that he receives a refund.
66. Individually, the vehicle's defects do not appear to be of such a serious nature that they render the vehicle unfit for use.. However, when the defects are viewed cumulatively, keeping in mind that the Applicant had specific expectations from the vehicle, which had not been met; the defects are sufficiently serious to find that they render the vehicle; as a whole; defective.
67. The Applicant purchased a luxury vehicle. If it exhibited the type of defects complained of; a consumer would be entitled to demand that the vehicle be replaced or that the purchase price be refunded.

CONCLUSION

68. Under the CPA, the Applicant is clearly entitled to receive a refund of the full price paid for the vehicle as envisaged in section 56 (3).
69. The Tribunal finds that the Applicant should be refunded the purchase price of R 401,400.00.

Notice in terms of Section 115 (2) (b)

70. Section 150 of the NCA empowers the Tribunal to make an appropriate order concerning prohibited or required conduct in terms of the NCA or the CPA. Section 115 (2) (b) of the CPA requires a person who has suffered a loss due to prohibited conduct and who wishes to institute legal proceedings and claim damages, to file a notice from the chairperson of the Tribunal with the Registrar or clerk of the court (the notice).
71. Consequently, where the Tribunal concludes the Respondent's conduct to be prohibited in terms of the CPA, the Applicant is entitled to exercise his rights and request the chairperson to issue a Section 115 (2) (b) notice.

ORDER

72. Accordingly, the Tribunal makes the following order:

72.1 The Application is upheld;

72.2 The Respondent has contravened the following sections of the CPA:

72.2.1 Section 29;

72.2.2 Section 41;

72.2.3 Section 54;

72.2.4 Section 55; and

72.2.5 Section 56.

72.3 The Respondent's conduct is hereby declared prohibited conduct in terms of Section 150 (a) of the NCA;

72.4 The Respondent shall repay the Applicant the amount of R 401,400.00 within thirty (30) business days of the issuing of this order; into a bank account chosen by the Applicant; and

72.5 There is no order as to costs.

THUS HANDED DOWN AT CENTURION ON THIS 17th DAY OF APRIL 2021.

[Signed]

MC PEENZE

TRIBUNAL MEMBER

Concurring: Tribunal Members: Mr T Bailey and Ms H Alwar

Authorised for issue by The National Consumer Tribunal

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national consumer tribunal